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IN THE

Supreme Court Of The United States

No. _____

OCTOBER TERM, 1983

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT
OF CORRECTION ..... *Petitioner*

VS.

JAMES DEAN WALKER ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER IN SUPPORT OF PETITION

JOHN STEVEN CLARK
ATTORNEY GENERAL
State of Arkansas
Counsel of Record

THEODORE HOLDER
ASSISTANT ATTORNEY GENERAL
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the findings of fact made by the district court below were clearly erroneous, as that term is understood in Fed.R.Civ.P. 52 (a), such that the court of appeals could properly disregard them and make new findings on appeal?

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The Petitioner respectfully prays this Court to issue forth a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit set out herein, *infra*.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears as *Walker* v. *Lockhart*, at 713 F.2d 1378 (1983) and is reproduced in the Appendix, *infra*. The orders of that Court denying rehearing were entered on 29 September and 4 October 1983 and are reproduced in the Appendix, *infra*.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was delivered on 11 August 1983. The petition for rehearing before the court en banc was denied on 29 September 1983. An amended order denying rehearing was issued on 4 October 1983.

This Court has jurisdiction by virtue of 28 U.S.C. § 1254 (1).

LEGAL PROVISION INVOLVED

Rule 52 (a), Federal Rules of Civil Procedure

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a matter, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41 (b).

STATEMENT OF THE CASE

The Respondent was convicted of the 1963 murder of a North Little Rock, Arkansas policeman. After a reversal of the conviction by the Arkansas Supreme Court and a retrial, the Respondent was sentenced to life imprisonment. He then served some twelve years in the Arkansas Department of Correction.

During that time, Walker became somewhat of a celebrity. He ostensibly underwent a religious conversion and began something like a personal ministry. For purposes of speaking to various groups around the state, the Respondent was granted furloughs from time to time. In 1975 he failed to return from one of those furloughs.

In 1979 the Respondent was discovered in California living under an assumed name by means of fingerprints after having been arrested for selling illicit drugs. Arkansas immediately sought to regain custody of him, and the Respondent fought extradition for as long as possible.

He finally returned to Arkansas in May of 1981. At that time he filed several actions in the United States District Court for the Eastern District of Arkansas, among them the case at bar, a complaint filed pursuant to 42 U.S.C. § 1983.

In this action he maintained that incarceration in the Arkansas prisons was tantamount to cruel and unusual punishment. It was alleged that the Petitioner, the director of the Arkansas Department of Correction, had threatened Walker's life before he escaped and that, because of this fact, the Respondent's life would be threatened by other inmates in the Arkansas prison system, or at least those who would like to discredit Lockhart. He asked that he be ordered transferred to another prison system, state or federal, to serve the remainder of his sentence.

Hearings were held on this matter on 13 May 1981 and 15 June 1981. Evidence was adduced concerning the alleged threats and the proposed plans for housing the Respondent within the Arkansas prison system. It was never disputed that the Respondent would be in some danger around some inmates who had a grudge against the Petitioner. The witnesses who testified in Lockhart's behalf, stated that this danger would diminish in time and that the prison personnel could adequately protect the Respondent from this danger.

The district court, sitting without a jury, made no finding of fact concerning the alleged threats, but did find that the Respondent was safe within the Arkansas prisons and that he would continue to be safe.

The Respondent then appealed the decision to the United States Court of Appeals for the Eighth Circuit, which reversed the district court and ordered the

Respondent transferred to another prison system. In so ruling, the court of appeals in effect reversed virtually every significant finding of fact made by the district court.

The Respondent was housed in the Diagnostic Unit of the Arkansas Department of Correction under a classification known as administrative segregation for the duration of his stay in Arkansas. This classification was much like solitary confinement and was usually reserved for inmates requesting protection. The Arkansas prison officials attempted to remove Walker from this classification in April of 1982, but the Respondent resisted and obtained an order from the Court of Appeals requiring him to be held in administrative segregation.

ARGUMENT

I.

THE REJECTION OF THE DISTRICT COURT'S FINDINGS OF FACT WAS IMPERMISSIBLE AND IN VIOLATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW.

In this case the Court of Appeals for the Eighth Circuit ordered the Respondent, a state prisoner serving a life sentence, moved out of the Arkansas prison system and into another state's prison system or the federal prison system. The basis of this decision

was a finding by the Court of Appeals that the Arkansas prison authorities could never adequately protect the Respondent from harm from other inmates.

This finding of fact was a conclusion opposite of that reached by the district court concerning the same evidence presented to the district court. Certiorari is sought in this case to resolve the question of whether the Court of Appeals properly made that finding of fact. It is the contention of the Petitioner that that finding was impermissible under the clearly erroneous standard of review set out in Fed.R.Civ.P. 52 (a). The decision of the Court of Appeals is in conflict with decisions of this Court, interpreting Rule 52 (a). That fact is a consideration militating in favor of granting a writ of certiorari. See Rule 17 (c), Rules of the Supreme Court of the United States. The judgment of the Court of Appeals should be reversed accordingly and the judgment of the district court reinstated.

Fed.R.Civ.P. 52(a) provides in pertinent part that, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The rule is of long standing. In the celebrated case of *United States* v. *United States Gypsum Company*, 333 U.S. 364 (1948), the Court stated that a fact finding is clearly erroneous:

> . . . when although there is evidence to support it, the reviewing court on the entire evidence is left

> with the definite and firm conviction that a mistake has been committed. 333 U.S. at 395.

The standard has been stated to be akin to a substantial evidence standard of sufficiency of the evidence in that a district court's finding of fact generally cannot be set aside as clearly erroneous if there was substantial evidence to support it. *Northcross* v. *Board of Education of the Memphis, Tennessee City Schools*, 397 U.S. 232 (1970) (*per curiam*). A brief review of the evidence adduced herein shows that the finding of the district court that the Respondent would be adequately protected within the Arkansas prison system to have been supported not only by substantial evidence, but also by the preponderance of the evidence.

As noted in the statement of the case, the Respondent was returned to Arkansas from his sojourn to California while on escape in the spring of 1981. He immediately filed, *inter alia*, a complaint pursuant to 42 U.S.C. § 1983 alleging, *inter alia*, that the Arkansas authorities could not protect him from harm within the Arkansas prison system, that that incapacity rendered incarceration in Arkansas cruel and unusual in contravention of the Eighth Amendment to the Constitution and that the proper remedy was an injunction ordering the Arkansas authorities to transfer him to another prison system for the service for the remainder of his sentence. Two hearings were held on this matter, one on 13 May 1981 and the other on 15 June 1981 before

the district judge sitting without a jury.

(Copies of the records of both hearings have been lodged in this Court. The records are consecutively numbered, and all transcript references are made to those records.)

Cecil Boren was the only witness called by the Respondent with qualifications even approaching that of an expert in penology. (T. 78-81) He was permitted to testify as such an expert. (T. 81) He indicated at one point that the Respondent would be at a risk greater than the average prison inmate *anywhere* because of his celebrity status, (T. 105) but then indicated later that the Respondent was at risk in the Arkansas prison system only at the Cummins Unit of that system. (T. 108)

Mr. Boren was shown to have a large amount of animosity toward the Petitioner personally and the Arkansas Department of Correction in general because he had not received a job promotion when he worked in the Department of Correction. (T. 424, 466-67)

The resolution of Boren's self-contradiction and the worth to be given his testimony in light of the evidence of his partiality and animosity were matters committed to the district court's discretion. Appellate deference is especially due such rulings when the questions involve the weight and credibility to be given the testimony of witnesses observed by the district

judge and not by the appellate court. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982). Thus, it would not seem that the District Court's discounting of Mr. Boren's opinion, which is what was manifestly done, (T. 503), could be found to have been clearly erroneous only if the remainder of the record would lead one to conclude that the other witnesses testifying otherwise were utterly uncreditable. Such is not the case.

Dr. Robert Powitzky testified for the Petitioner. Dr. Powitzky holds a Ph.D. in clinical psychology from the University of Texas Medical School and a bachelor's degree from Baylor University. (T. 121, 122). He had worked in the field of Corrections (penology) for some ten years. For the previous three and one-half years, Dr. Powitzky had been the administrator of Psychology Services in the Federal Bureau of Prisons. He had been assigned to the Arkansas Department of Correction as an Assistant Director for Health and Correction Programs for the nine or ten months preceding the hearings in the District Court. (T. 122)

Dr. Powitzky testified that James Dean Walker was just as safe at the Diagnostic Unit as in any federal institution to which he would be assigned. (T. 123-124, 405) He noted that there would be fewer options in the federal system than there were in Arkansas (T. 407) and that he would be, in all probability, kept in segregation if sent to the Federal system. (T. 407)

A plan was made for assuring the Respondent's safety and eventually integrating him into the general prison population at the Diagnostic Unit. There was no testimony from any witness that it was contemplated that the Respondent would ever be put into the general population at the Cummins Unit.

The specifics of the plan were as follows. In a part of the Diagnostic Unit known as the Intake Barracks area is a group of eight cells surrounding a glassed in command post. (T. 385) Four cells are arrayed on either side of the command post, two above the other two. (T. 386) The doors on the cells are electronically controlled from the command post, in which there is a guard around the clock, twenty-four hours per day. (T. 396, 396) The Respondent would first be placed in one of those cells and continue to be kept under the isolated conditions he was then being housed. (T. 395) The next phase would be to integrate the Respondent into larger and larger communities of the Diagnostic Unit, i.e., the cell block, the persons with whom he would be working, etc. (T. 387, 388, 397)

The timing of the phases would depend on factors such as the Respondent's degree of cooperation and, most of all, the dying down of the sensation of the story about the threats allegedly made by the Petitioner to the Respondent — and the concommitant death of the Respondent's notoriety. (T. 397, 398)

Mr. Terrell Don Hutto also testified on behalf of

the Petitioner. At the time of the hearings below, he was the Director of the Virginia Department of Correction, (T. 484), and from 1971 through 1976, he had been the head of the Arkansas Department of Correction. (T. 465) He was qualified as an expert in penology almost by agreement and without objection by the Appellant. (T. 464)

It was Mr. Hutto's opinion that the Respondent would be as safe in the Arkansas Department of Correction as he would be in any prison system in the country. (T. 474, 475) California's prison system was discussed specifically. Mr. Hutto listed three precise reasons why the Respondent would be safer in Arkansas than in a California prison and displayed a fair amount of knowledge about that prison system. (T. 475, 476) He did not find this case unusual and had had to arrange special protective measures for other inmates in the past.

In his seventeen years of experience in corrections, Mr. Hutto had seen many inmate homicides triggered by many things, but never because the victim had publicly accused the warden of the prison or head of the prison system of threatening his life. (T. 486, 487) In the celebrated case that ended up bearing the name, *Finney* v. *Hutto*, 437 U.S. 522 (1978), Mr. Hutto remembered sitting in court for weeks and hearing many inmates make similar statements about the various officials of the Arkansas Department of Correction and receive similar media coverage. These

inmates were successfully protected in the Arkansas prison system, and Mr. Hutto saw no real difference in those cases and Mr. Walker's. (T. 488, 489)

The petitioner testified that he thought the Respondent was as safe at Diagnostic as he would be anywhere else. (T. 434) He confirmed Dr. Powitzky's statement of the plans that had been made for the Respondent and stated further that the Department of Correction was completely capable of ascertaining which inmates might post a threat to the Respondent's safety and keeping them away from him. (T. 434, 454, 45, 457)

Implicit in the plans for the Respondent was the expectation that as time went on, the Respondent's notoriety would decrease, as would the danger posed to his safety by other inmates.

The district court issued its findings of fact and conclusions of law orally from the bench. It was specifically found that the Respondent was safe in the Arkansas prison system and that he would continue to be safe under the plans outlined for him by Dr. Powitzky. (T. 502, 503, 505)

The crux of the opinion of the Court of Appeals is that the Respondent could never be kept safely in the Arkansas prison system. In so holding, the Court of Appeals in effect reversed the findings of fact of the district court, and this reversal cannot be upheld.

As stated in *Inwood Laboratories, supra,* at 456 U.S. 858, 859:

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *Real Estate Boards,* 339 U.S. 485, 594, 94 L.Ed. 1007, 70 S.Ct. 711 (1950).

The particular error made in this case is that the lower court gave the evidence different weight than was given it by the trial court and gave the entire evidence a different interpretation for no stated or apparent reason. The upshot of this interpretation was that other inmates would for all practical purposes *always* pose a threat to the Respondent. Although the phrase, in the foreseeable future, is used, its meaning as both Dr. Powitzky and the district court used the term, is discarded. The Court of Appeals finds that these conditions of danger to the Respondent would continue for an intolerably long period of time. It is clear that the district court did not so find. Also disregarded was the district court's finding that the Arkansas Department of Correction was well able to protect the Respondent from that danger while it lasted.

The discussion concerning the conditions under

which the Respondent was being kept had to have been based on the Respondent's petition for an injunction pending appeal pursuant to Fed.R.App.P. 8, found at page A-29 of the Appendix. Those facts were set out in the petition and response and affidavit filed in answer to the petition and not at any hearing. As is apparent from a reading of those pleadings and a fair reading of the evidence adduced at the hearings, the conditions set out there are temporary only, and self-induced. The Court of Appeals, however, speaks of them as permanent. That interpretation of the evidence totally disregards the testimony of Dr. Powitzky and the Petitioner for no good reason.

The assignment of weight given the evidence is solely within the province of the trier of fact, the district court, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc., supra,* and the reassignment of weight given the evidence on appeal with no reason stated therefore was error.

As stated in *Zenith Radio Corporation* v. *Hazeltine Research, Inc. et al,* 395 U.S. 100k at 123, in reviewing findings of fact by district courts, appellate courts must always remember "that their function is not to decide factual issues de novo." The Petitioner submits that the Court of Appeals has in effect sat as a trier of fact with only the cold record before it and decided the facts in this case anew. A writ of certiorari should issue accordingly, and this error be corrected.

CONCLUSION

For the aforementioned reasons and authorities, the Petitioner respectfully prays this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN STEVEN CLARK
ATTORNEY GENERAL
State of Arkansas
Counsel of Record

THEODORE HOLDER
ASSISTANT ATTORNEY GENERAL
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1700 (Civil Rights)

James Dean Walker,
Appellant,

v.

A. L. Lockhart, Superintendent of the Arkansas Department of Corrections,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: December 18, 1981

Filed: August 11, 1983

Before HEANEY, BRIGHT, and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

James Dean Walker, an inmate in the Arkansas prison system, brings this action under 42 U.S.C. § 1983, alleging that his continued confinement in the Arkansas prison systems amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments. Walker petitions this court to enter an appropriate order for his protection and he suggests that this court order the Arkansas authorities to transfer him either to another state's prison system or to the federal prison system. The district court granted interim relief pending disposition of this complaint, as well as a simultaneous petition for habeas corpus. After a full evidentiary hearing, the district court denied all of Walker's requests for relief and Walker appealed.[1] Subsequently, this court entered a protective order

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[1]Walker appealed both from the district court's dismissal of his section 1983 claim and from the court's dismissal of his habeas claim. Following oral argument before this panel, the court, on this panel's recommendation, referred the case to the court *en banc*. Subsequently, the court *en banc* directed this panel to decide Walker's section 1983 claim. In effect, the court *en banc* bifurcated Walker's appeal. The court *en banc* heard oral argument on Walker's habeas claims on September 15, 1982. For administrative clarity the court has designated Walker's section 1983 claim as No. 81-1700 (Civil Rights) and his habeas claim as No.

directing the Arkansas authorities to take certain specified steps to protect Walker during the pendency of this appeal. *Walker* v. *Lockhart*, 678 F.2d 68 (8th Cir. 1982). Having reviewed the record, we vacate the judgment of the district court and remand this case with directions to grant Walker's requested relief on his civil rights claim under 42 U.S.C. § 1983.

I. *Procedural Background.*

James Dean Walker is serving a life sentence for the fatal shooting of a North Little Rock, Arkansas, policeman in 1963. James Dean Walker's sojourn through the judicial system began in 1964 when a jury found Walker guilty of murdering a North Little Rock policeman and sentenced Walker to death. On appeal, the Arkansas Supreme Court reversed the conviction and remanded the cause for a new trial. *Walker* v. *State*, 388 S.W.2d 13 (Ark. 1965). At the second trial a jury again found Walker guilty but sentenced him to life imprisonment. Walker's second appeal to the Arkansas Supreme Court was unsuccessful. *Walker* v. *State*, 408 S.W.2d 905 (Ark. 1966), *rehearing denied*, 408 S.W.2d 917 (Ark. 1966) (two justices dissenting), and the Supreme Court denied certiorari. *Walker* v.

81-1700 (Habeas). This panel has determined that it is appropriate to file this opinion even though the court en banc has yet to file its decision regarding Walker's habeas claim.

Arkansas, 386 U.S. 682 (1967). Thereafter, Walker filed a petition for habeas corpus in the United States District Court for the Eastern District of Arkansas. After conducting an evidentiary hearing, the district court denied Walker's petition. *Walker* v. *Bishop*, 295 F. Supp. 767 (E. D. Ark. 1967). On appeal this court affirmed. *Walker* v. *Bishop*, 408 F.2d 1378 (8th Cir. 1969).

From the beginning of his incarceration until March of 1975, Walker was a model prisoner. During this period, Walker apparently experienced a religious rebirth; while incarcerated, Walker participated in several charitable and religious projects. The Arkansas Board of Corrections even permitted Walker to leave prison on dozens of furloughs so that he could give speeches and do other charitable and religious work around the state.

In March of 1975, Walker failed to return from an overnight furlough. Approximately four and one-half years later, California law enforcement authorities apprehended Walker. The State of Arkansas began extradition proceedings, but Walker filed motions to block extradition in both the federal and California courts. Walker contended that the Arkansas prison system was not operating in compliance with the eighth amendment and that if he returned to Arkansas he would be in grave danger. On April 9, 1980, the California Supreme Court issued a writ of habeas corpus, directing the Superior Court of El Dorado

County to hold an evidentiary hearing on Walker's contentins. *In re Walker on Habeas Corpus,* Crim. No. 21422 (Cal. Apr. 9, 1980). Justice Rehnquist, acting as Circuit Justice, stayed the California Supreme Court's order pending consideration by the full United States Supreme Court. *Pacileo* v. *Walker,* 446 U.S. 1307 (1980) (Rehnquist, Circuit Justice). The Supreme Court reversed the California Supreme Court in *Pacileo* v. *Walker,* 449 U.S. 86 (1980) (per curiam), and Walker returned to Arkansas.

Upon his return, Walker brought suit against several individuals, including A. L. Lockhart,[1] the Superintendent of the Arkansas Department of Corrections. Walker's suit combined a claim under 42 U.S.C. § 1983 with a writ of habeas corpus. In his section 1983 claim Walker contended that his confinement within the Arkansas penal system violated the eighth amendment prohibition against cruel and unusual punishment. Specifically, Walker alleged that as a result of threats made against his life by Lockhart, his life will be in danger if he returns to the general prison population in Arkansas. Walker requested an order directing that he serve the remainder of his sentence outside the Arkansas prison system, in either a federal penitentiary or a prison in another state. Following an expedited hearing solely on the issue of

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[1]All of the other named individuals were later dismissed from the suit.

Walker's immediate safety, the district court ordered that Walker remain at the prison system's intake facility, the Pine Bluff Diagnostic Unit (Pine Bluff), until the court ruled on the merits of Walker's claims. *Walker* v. *Lockhart*, 514 F. Supp. 1347, 1349 (E.D. Ark. 1981). Walker had voluntarily been in what is, essentially, solitary confinement at Pine Bluff since his return from California.

After a hearing on the merits of Walker's claims, the district court dismissed both Walker's section 1983 claim and his petition for a writ of habeas corpus. *Walker* v. *Lockhart*, No. LR-C-81-280 (E.D. Ark. 1981). Although the district court made no findings of fact relating to Lockhart's alleged threats against Walker, the court stated that the "white light of publicity" surrounding Walker's case ensured that Walker would be safer in the Arkansas prison system than in any other prison system. The district court left the matter of Walker's safety to the discretion of the Arkansas prison officials. Walker appealed. Thereafter, the Arkansas authorities began implementing their plan to phase Walker back into the general prison population. On May 4, 1982, this court, at Walker's request, entered a protective order directing that Walker's condition be maintained at Pine Bluff exactly as it had been prior to the district court's dismissal of Walker's claims.[1] *Walker* v. *Lockhart*, *supra*, 678 F.2d

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[1]Subsequently, Walker filed another petition for a protective order, contending the Arkansas authorities

at 71. We turn now to the factual background of Walker's section 1983 allegation.

II. *Procedural Background.*

Inasmuch as the district court made no findings of fact on the key issue relating to Lockhart's alleged threats against Walker, we think it necessary to summarize the testimony on this point.

A. *Walker's Evidence of Threats.*

Walker testified that five or six weeks after prison authorities transferred him from the Tucker Unit to the Cummins Unit in 1974, Lockhart, then the warden at Cummins, threatened to kill him. This alleged incident arose in connection with Walker's prison job. Walker worked in the prison meatpacking facility and his job included keeping records of all disbursements of meat and other foods.

Walker stated the incident began with a phone call from an unidentified caller, telling Walker that

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had failed to comply with this court's May 4, 1982 order. On March 10, 1983, we reiterated our May 4 order and took Walker's specific allegations under advisement. Our disposition today of Walker's section 1983 claim renders these claims moot.

"Johnny Robinson wishes to draw two pounds of ground beef, half a pound of cheese, and a half a pound of sliced bologna." [T. 45-46] Walker asked the caller who Johnny Robinson was and the caller responded, "It's Mr. Lockhart's houseboy, goddamn it." [T. 46] Walker testified that ten minutes later Major Henderson and Lieutenant Norris came into the work area, handcuffed Walker, and took him to Lockhart's office. In addition to Lockhart, Walker stated Majors Henderson and Hawke were also in Lockhart's office. Walker described the meeting:

> I was brought in and Mr. Lockhart was sitting at his desk, looking at me. He asked me what the hell I thought I was doing, refusing the meat order. And I started to explain my position, that I had been told not to fill meat orders; at this point he became enraged. He says: "I don't give a goddamn who told you what." He says, "Let me tell you right now", he said, "I am running this prison, goddamn it, not you, not anyone else." He said, "Do you understand me, you sorry son of a bitch", he said, "You're not at the Tucker unit now. You're over here. You belong to me now."
>
> He said, "What the hell business you think you have", he said — I said, "Sir" — I tried to explain my position. I said I was doing the best job I had been told how to do." He said, "Your best is not good enough". He said, "Let me tell you, you sorry son of a bitch", he said, "I'll bury you

out there in that goddamn field." He said, "Do you understand me?" I said, "Yes, sir, I do."

He said, "You understand me? Do you understand what I am saying to you", he said, "You're not at the Cummins unit — Tucker unit any more. You're over here now", and he said, "I'll have you killed you sorry son of a bitch. Do you believe me?" I said, "Yes, sir, I do."

He said, "Do you believe me?" Again, he asked me.

I said, "Yes." [T. 49-50]

Walker stated that this meeting continued in the same vein for several minutes until Lockhart told Major Henderson to take Walker back to the meatpacking plant and that if he gave anyone trouble, "Bring him back to me in a sack." [T. 51] Walker testified that there was no doubt in his mind that Lockhart meant exactly what he had said and that if he were returned to the general population at Cummins, Lockhart "could arrange for my physical harm or outright death at any time * * * he wished to." [T. 55]

Bill Baker, a long-time civilian friend of Walker's, corroborated the basics of Walker's testimony. On his last furlough from Cummins, Walker visited Baker and his family. Baker testified that on Walker's last day of his furlough he seemed frightened and unusually un-

easy. Baker had asked Walker why he was so preoccupied and Walker said that Lockhart had threatened his life.

Charlie Branch, a former inmate in the Arkansas prison system, testified that in 1974 Lockhart told him that if he wanted a furlough to see his wife and child he should kill Walker. Branch stated that Lockhart went so far as to explain how he might go about committing the crime. Another former inmate, Bill Thompson, testified that in 1972 or 1973, while both he and Walker were incarcerated at the Tucker Unit, he overheard Lockhart discussing Walker with the warden at Tucker. According to Thompson, Lockhart told Tucker's warden, "Send the copkilling son of a bitch to Cummins, I know what to do with him." [T. 197]

Cecil Boren, presently employed at the Federal Correctional Institution at Texarkana, Arkansas, and formerly the assistant superintendent at Cummins, testified under subpoena as a witness for Walker. Boren testified that while he was at Cummins he had personally heard Lockhart make threatening statements about Walker. Specifically, Boren stated, "I recall an instance where Mr. Lockhart stated that if Walker ever run off or ever gave us any trouble, that he was going to see that he got — that he would be killed or eliminated." [T. 85] Boren also stated that Lockhart was a very serious man who did not make idle threats. [T. 86] Moreover, Boren stated that he had heard Lockhart make numerous threats against other prisoners. [T. 87]

B. *The State's Evidence with Regard to Threats.*

Lockhart's testimony contradicted much of Walker's and Boren's testimony. Lockhart categorically denied ever threatening Walker. He testified that he never told Boren or anyone else that he would like to see Walker harmed. [T. 431] Moreover, Lockhart stated that he could not recall ever having a conversation in his office with Walker and that he had not known of any problems between Walker and inmate Johnny Robinson. [T. 443] Lockhart also pointed out that it was he who had recommended Walker for his last furlough.

Michael Hawke corroborated Lockhart's testimony. Hawke testified that he had never been present at a conversation between Lockhart and Walker, [T. 416] and denied any knowledge of the threats outlined by Walker. [T. 417]. He stated that he had never heard Lockhart threaten any prisoner. [T. 420]

The State presented evidence in an attempt to impeach the credibility of Cecil Boren. Jerry Campbell, warden at the Tucker Unit, and Terrell Hutto, former Commissioner of the Arkansas Department of Corrections and presently Director of the Virginia Department of Corrections, both testified Boren had wanted Lockhart's job as warden at Cummins. They testified that Boren held a lot of animosity against Lockhart. [T. 424, 466-67.] On cross-examination, Walker's attorneys attempted to discredit Campbell's testimony by bringing out the fact that Lockhart had not taken

disciplinary action against Campbell for an alleged instance of brutality at the Tucker Unit. Lockhart stated that he had not been in the chain of command with regard to that event.

C. *Walker's Safety.*

Throughout the hearing, both sides elicited considerable testimony concerning the issue of James Dean Walker's safety. Cecil Boren summed up the testimony for Walker when he stated:

> In my judgment if James Dean Walker is placed back in the general population at Cummins Prison, I don't think he will make it.
>
> * * * *
>
> I think someone down there will kill him. [T. 81]

Boren explained his reasoning:

> [T]here's many inmates at Cummins Prison right now [that are] serving life sentences without ever hope of parole, and if they have a vendetta against Mr. Lockhart, or any other official down there, they could knock James Dean Walker off to get back at the administration. [T. 81]

Dr. Robert Powitzky, Assistant Director in charge of Health and Correctional Programs for the Arkansas

Department of Corrections, appearing as a State's witness, testified that there were no plans to place Walker back at Cummins. Dr. Powitzky stated that the Department of Corrections planned to keep Walker housed at Pine Bluff and to phase him gradually out of administrative segregation and back into general prison life. Dr. Powitzky stated that he thought Walker would be safe under this plan. Other Arkansas officials testified that they thought that they could keep Walker safe. Terrel Hutto stated that "Mr. Walker is as safe * * * [at Pine Bluff] as Mr. Walker would be in any prison system in the country." [T. 474-75]

Dr. Powitzky also testified that there is a substantial likelihood that an inmate with a personal vendetta against Lockhart might try to harm Walker to make Lockhart look bad. [T. 392] Dr. Powitzky stated that this problem would continue into the foreseeable future. [T. 399] Dr. Powitzky stated that on occasion inmates are permanently transferred from Cummins to Pine Bluff to relieve overcrowded conditions at Cummins, and that this would, in fact, pose a threat to Walker if any of the transferred inmates had access to him. [T. 399].

The district court, specifically crediting the testimony of Terrell Hutto, found that the Arkansas Penitentiary would be the safest place for Walker to be incarcerated. [T. 502] As previously noted, the district court did not make any findings on whether Lockhart did, in fact, threaten Walker.

III. *Discussion.*

We, of course, will not undertake to determine whether Lockhart, in fact, threatened Walker's life. After reviewing the record, however, we are in a position to conclude that there exists substantial, uncontradicted evidence to indicate that any reasonable person in Walker's position would have ample reason to fear for his safety above that fear experienced by the ordinary inmate incarcerated in the Arkansas penal system. The evidence indicates that Walker faces increased danger in the Arkansas prison system if he is allowed to mix with the system's general population.

Walker's notoriety and his present claim that Lockhart has threatened him, makes Walker an inviting target for any disgruntled prisoner who wants to embarrass the prison authorities. In making this statement, we emphasize that we do not find that Lockhart ever made any threats against Walker, or that he has any present intention of harming Walker. However, in light of the statements by Dr. Powitzky and by Lockhart himself conceding that Walker faces an increased risk of danger in the Arkansas prison system, we conclude that Walker should be transferred to another prison system. The expressions of opinion by the Arkansas authorities cannot be discounted or dismissed.

Walker remains in virtual solitary confinement at the Pine Bluff Unit. Walker is entitled to the same

privileges and amenities as any other prisoner in the institution. In other words, Walker cannot be kept in solitary confinement forever. Walker must be allowed to receive visitors, he should have the right to daily showers, to daily exercise, and to other privileges enjoyed by other prisoners in an institution. Walker is entitled to contact with other prisoners and it is the obligation of the prison authorities to ensure that Walker is protected. In addition, Walker should be required to perform such prison duties as are appropriate; he should not be kept in idleness.

We recognize that the administration of prisons is generally not within the province of the courts. Here, however, the undisputed evidence demonstrates that Walker's continued confinement in the Arkansas prison system will subject him to an unusually high risk of physical danger. This is unacceptable. We do not intend by our remarks to demean the efforts of the prison authorities to integrate Walker back into the general prison population, however, it is extremely unlikely that these efforts can ever sufficiently negate the risk to Walker's safety. In light of the special factors present in this case, we conclude that the interests of James Dean Walker as well as the Arkansas prison system, would be best protected if Walker served out the remainder of his sentence in another jurisdiction. We do not agree with the district court that the "white light of publicity" will ensure Walker's safety. It is a truism that today's headlines are soon

forgotten. Here there is no evidence in the record to show that Walker's notoriety will keep him safe; there is ample evidence to the contrary.

We hold that Walker's life is put in danger by his incarceration in the Arkansas general prison population and that Walker has established the right to serve the remainder of his sentence in an institution outside of Arkansas where he will have the same privileges and obligations as other prisoners, but without facing undue risks and fears for his safety. Accordingly, we reverse the judgment of the district court denying Walker's section 1983 claim. We remand this case to the district court for entry of an order in conformity with this opinion directing A. L. Lockhart to arrange without undue delay for the transfer of James Dean Walker to a place of incarceration outside of Arkansas, either in a federal or another state's correctional institution.[4]

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[4]On June 27, 1983, the court received a petition from Walker's attorneys styled "Petition for Independent Medical Inquiry." Walker's counsel contended that Walker's two years in solitary confinement may have adversely affected Walker's physical and mental health. This panel referred the petition to the district court directing it to order an appropriate medical examination of Walker without expense to the public and to enter any such further orders as it deems appropriate. We also directed the district court to

ROSS, Circuit Judge, dissenting.

I dissent.

I disagree with the majority's opinion for the reasons set forth by the trial judge.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

FILED August 11, 1983
Carl R. Brents, Clerk

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certify to this court all of the records pertaining to Walker's examination and any related district court proceedings. *See Walker* v. *Lockhart*, No. 81-1700 (8th Cir. July 19, 1983) (unpublished order). If, by the time this court issues its mandate in this case, the district court has not yet certified these records to this court, we relinquish our jurisdiction over Walker's supplementary petition and either party aggrieved by the district court's final order may seek appellate review in the normal manner.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1700 (Civil Rights) September Term 1983

James Dean Walker,
Appellant,
vs.
A. L. Lockhart, Superintendent
of the Arkansas Department
of Corrections,
Appellee.

Appeal from the United
States District Court
for the Eastern District
of Arkansas

The Court, having considered appellee's petition for rehearing en banc on civil rights issue and being now fully advised in the premises, hereby orders the petition for rehearing en banc denied. Judges John R. Gibson, Fagg and Bowman would grant the petition.

September 29, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1700 (Civil Rights) September Term 1983

James Dean Walker,
Appellant,
vs.
A. L. Lockhart, Superintendent
of the Arkansas Department
of Corrections,
Appellee.

Appeal from the United
States District Court
for the Eastern
District of Arkansas

AMENDED ORDER

The Court, having considered appellee's petition for rehearing en banc on civil rights issue and being now fully advised in the premises, hereby orders the petition for rehearing en banc denied. Judges Ross, Fagg and Bowman would grant the petition.

October 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1700

James Dean Walker,
Appellant,

vs.

A. L. Lockhart, Superintendent
of the Arkansas
Department of Corrections,
Appellee.

Appeal from the United
States District Court
for the Eastern
District of Arkansas.

Submitted: December 18, 1983

Filed: May 19, 1982

Before HEANEY, BRIGHT, and ROSS, Circuit Judges.

PER CURIAM.

James Dean Walker, an inmate in the Arkansas prison system, petitions this court for an order enjoining Arkansas prison officials from transferring him from protective custody in the Diagnostic Unit at Pine Bluff, Arkansas, to other conditions of confinement pending this court's ruling on the merits of Walker's appeal in his civil rights action against A. L. Lockhart, Superintendent of the Arkansas Department of Corrections. For the reasons outlined below, we grant the injunction pending appeal.

I. *Background.*

In 1975, Walker failed to return from a furlough to the Cummins Unit of the Arkansas Prison System, where he was serving a life sentence for first degree murder. Four years later, Walker was apprehended in California, and subsequently extradited to Arkansas. Upon his return, Walker filed an action against Lockhart, combining a claim under 42 U.S.C. § 1983 and a petition for a writ of habeas corpus. In his section 1983 claim, Walker contended that the State of Arkansas could not confine him within the Arkansas penal system without contravening the eighth amendment prohibition against cruel and unusual punishment. Because of the events that occurred when he was a prisoner at the Cummins Unit, Walker alleged that his life would be endangered if he were forced to return to the general prison population. Walker requested an

order directing that he serve the remainder of his sentence outside the Arkansas penal system, in either a federal penitentiary or a prison in another state.

Because Walker's immediate safety was at issue, the district court[1] held an expedited hearing, prior to the hearing on the merits of Walker's section 1983 claim and petition for a writ of habeas corpus. At that hearing, Dr. Robert Powitzky, an official of the Arkansas Department of Corrections, testified that the Pine Bluff Diagnostic Unit was the only facility within the Arkansas prison system in which the State could safely incarcerate Walker pending a ruling on the merits of his complaint. *Walker* v. *Lockhart*, 514 F. Supp. 1347, 1349 (E.D. Ark. 1981). The court ordered that Walker should remain at the Diagnostic Unit until the court ruled on the merits of his claim.[2]

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[1]The Honorable Henry Woods, United States District Court for the Eastern District of Arkansas.

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[2]The district court cited the testimony of Dr. Robert Powitzky as the basis of its determination.

> It was determined that, for the plaintiff's immediate safety pending final resolution of his complaint, the Pine Bluff Diagnostic Unit of the Arkansas Penal System was the only proper, safe place of detention for the plaintiff. Dr. Robert Powitzky, an Arkansas State Correction official

After a hearing on the merits, the district court dismissed Walker's section 1983 claim and his petition for a writ of habeas corpus. The district court's order left it to the discretion of Arkansas prison officials to provide for the safety of James Dean Walker within the Arkansas prison system. *Walker* v. *Lockhart*, No. LR-C-81-280 (E.D. Ark. June 15, 1981). Walker appealed to this court from that order.

When this court heard oral argument in Walker's appeal, Walker remained in administrative segregation at the Pine Bluff Diagnostic Unit by his own choice. At oral argument, the Assistant Attorney General representing Lockhart described the Pine Bluff Diagnostic Unit as a facility designed for "intake purposes," from which inmates are transferred to one of the state's penal institutions. He also indicated that the State would not return Walker to the Cummins Unit, but that it had a specific plan to phase Walker back into the general prison population. After his removal from

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assigned to the Pine Bluff Diagnostic Unit, testified that the plaintiff should not be reutnred to the general population of the Cummins Unit. Further, he testified that the Pine Bluff Diagnostic Unit was the only facility within the Arkansas Penal System wherein plaintiff could be safely incarcerated pending resolution of his complaint. [*Walker* v. *Lockhart*, 514 F. Supp. 1347, 1349 (E.D. Ark. 1981).]

administrative segregation, Walker would be transferred to a cell block of approximately eight cells. Walker would receive a work assignment, in which he would work with two or three other inmates under the supervision of two guards at all times.

The Arkansas prison authorities have apparently begun to implement this plan. Walker received an assignment to a work detail beginning April 12, 1982. Walker refused to accept the work assignment because he fears for his safety if he leaves administrative segregation. For his refusal to accept the work assignment, prison authorities placed Walker in punitive isolation.

Walker now petitions this court for a protective order requiring the Arkansas prison authorities to keep him in administrative segregation at the Pine Bluff Diagnostic Unit and for other appropriate relief pending a determination of the merits of his appeal.

II. *Discussion.*

Walker's request for a protective order amounts to an application for an injunction pending appeal. Rule 8 of the Federal Rules of Appellate Procedure directs that such a motion should ordinarily be made in the first instance in the district court. The rule states, however, that

> [a] motion for such relief may be made to the court of appeals or to a judge thereof, but the motion

> shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested[.] [Fed. R. App. P. 8.]

In dismissing Walker's section 1983 claim, the district court found that Walker was safe within the Arkansas prison system, and that under the State's plan for him he would continue to be safe in the foreseeable future. The court stated: "* * * I am unwilling to interfere with the operation of the Arkansas prison in respect to Mr. Walker." Record at 505, *Walker* v. *Lockhart*, No. LR-C-81-280 (June 15, 1981). In these circumstances, we think it unnecessary for Walker to apply first to the district court for injunctive relief under Rule 8, Fed. R. App. P. Moreover, because the appeal in this case is under submission, Walker properly requested such relief from this court.

In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction. *Hodges* v. *Brown*, 500 F. Supp. 25 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3d Cir.), *cert. denied*, 102 S.Ct. 101 (1981); *see also Woe* v. *Nebraska State Department of Public Welfare*, 598 F.2d 1146, 1147 (8th Cir. 1979) (Lay, J., dissenting); *Chicago Stadium Corp.* v. *Scallen*, 530 F.2d 204, 207 n. 2 (8th Cir. 1976); *Reserve Mining Co.* v. *United States*, 498 F.2d 1073, 1076-77 (8th Cir. 1974). In each case, the movant asks

the court to maintain the status quo until the court rules on the merits of the legal action to which the movant is a party.

In *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, 640 F.2d 109, 113 (1981) (*en banc*), this court outlined the factors to be considered in evaluating a request for a preliminary injunction.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. [*Dataphase Systems, Inc.* v. *C L Systems, Inc.*, *supra*, 640 F.2d at 113.]

Because of the equitable nature of the relief requested, however, the court maintains a flexible approach in applying the *Dataphase* factors and balancing the equities between the parties.

The merits of the appeal before this court involve substantial questions of law which remain to be resolved. Walker's assertion that acceptance of a work assignment bringing him into contact with the general prison population would subject him to risk of great bodily harm is not without evidentiary support. The State has kept Walker at the Pine Bluff Diagnostic

Unit since his return from California in 1981. The relief now requested by Walker will not impose an undue burden on the State of Arkansas. Any burden to the State in keeping Walker in administrative segregation is substantially outweighed by the threat of harm to Walker.

In *Dataphase,* the court indicated that "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Dataphase Systems, Inc.* v. *C L Systems, Inc., supra,* 640 F.2d at 113. Therefore, we need not engage in detailed analysis of Walker's probability of success on the merits.

In considering an application for a preliminary injunction, this court has stated that, at bottom, the request

> raised the question whether or not there were substantial questions of fact and law for determination and whether they were of such a substantial character as to require the preservation of the status quo until those questions could be determined. [*Chicago, B & Q Railroad* v. *Chicago Great Western Railroad,* 190 F.2d 361, 363-64 (8th Cir. 1951).]

We believe that the equities of this case require the court to intervene to preserve the status quo pending

the outcome of Walker's appeal.

Consistent with this opinion, we have heretofore entered an order on May 4, 1982, directing appellee Lockhart to maintain James Dean Walker's conditions of confinement as they existed on June 15, 1981.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

RECEIVED May 21
Attorney General of Arkansas

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES DEAN WALKER APPELLANT

v. No. 81-1700

A. L. LOCKHART, Superintendnet,
Arkansas Department of Corrections APPELLEE

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, LITTLE ROCK DIVISION, TO THE COURT EN BANC:

MOTION FOR PROTECTIVE ORDERS

For this pleading, James Dean Walker by his attorneys, Bill W. Bristow and Oscar Fendler, states:

1. James Dean Walker for a number of months has complained of the mistreatment that he has received from A. L. Lockhart and from all of the other officials at Cummins Diagnostic Center which is a unit of the Arkansas Criminal Detention Facilities. The most recent correspondence from Mr. Walker to Mr. Fendler has been typed and is attached hereto as Exhibit 1 and is incorporated herein by reference just as if fully copied herein. His original letter which was handwritten on yellow legal sheets is held by the attorney, Oscar Fendler, Blytheville, Arkansas, and is available to any

of the members of the Court or to the Clerk of the Court upon request. It may also be inspected by opposing counsel at any time.

2. Counsel for Walker assume that the statements he has made are true and correct. If there are any doubts about those statements, affidavits will be supplied if counsel are allowed to confer with their client. Walker is correct when he says that the officials adamantly refuse to allow him to talk to them by long distance even though demands have been made several times for such permission. This action taken by the authorities in regard to counsel for Walker who live over two hundred miles from Walker, who is an indigent client and who cannot afford to pay their expenses for traveling back and forth is absolutely ridiculous and is unexplainable. Counsel can only interpret the actions of Mr. Lockhart and his employees as recrimination against them for their zealous, unselfish efforts in behalf of Walker without expecting remuneration for their work.

3. Counsel will now give this Court a chronology of what has happened in this case in order to demonstrate the gross injustice that is being done to Walker:

(a) Walker was returned to Arkansas by extradition from California and placed in solitary in Cummins Diagnostic Center on May 9, 1981.

(b) Walker was brought to U.S. District Court

presided over by Judge Henry Woods on May 13, 1981, and June 15, 1981, for hearings and in each instance was returned to Cummins to solitary.

(c) Walker felt he must remain in solitary for his protection; therefore, there has been a continuity of solitary confinement for him since June 15, 1981.

(d) Walker was in punitive isolation by order of the state officials in charge of Cummins from April 12, 1982, until the Order of this Appellate Court dated May 4, 1982, and filed on May 19, 1982.

(e) Walker was then taken out of punitive isolation and remained in isolation nevertheless in the same cell with the only change being that of nomenclature. The other changes are set forth in detail in his attached letter, Exhibit 1, and they show how punitive these changes have been toward him.

(f) This Court ordered that new briefs be filed and oral argument be had in St. Paul, Minnesota, on September 15, 1982, all of which occurred.

(g) There has been no decision from the Court en banc since that date. Walker remains in isolation on this date. The prison authorities continue to harass him as described in his attached letter.

4. Regardless of whether the final decision of the Court en banc is in favor of Walker and grants the

prayer for a new trial and a new hearing of habeas corpus or is only partially in his favor or is totally contrary to his motions and requests, this Court should issue an express Order immediately which will prohibit the Arkansas prison officials from continuing to harass Walker and which will afford Walker whatever safety can reasonably be given to him under the situation as it now exists at Cummins. He should be fully protected from any onslaughts of injuries intentional or otherwise either by A. L. Lockhart or by any of the prison officials or by any inmates who might be harming Walker in order to incur favor in Lockhart's eyes.

WHEREFORE, James Dean Walker prays that this Court issue whatever Order it deems proper which will protect him from suffering the loss of his life or serious injury and which will prohibit the prison authorities from their continuous acts of vexatious harassment against him and that the Court order that he be transferred from any prison facility over which A. L. Lockhart has any control or jurisdiction and that he be transferred out of Arkansas to some other facility where he can spend his confinement in reasonable safety from harm and injury.

/s/ Bill W. Bristow
BILL W. BRISTOW
216 East Washington
Jonesboro, AR 72401
501/935-9000

/s/ Oscar Fendler
OSCAR FENDLER
P. O. Box 548
Blytheville, AR 72315
501/763-6891

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing has been served upon the Attorney General, Justice Building, Little Rock, Arkansas 72201, Attention: Carter Hardage and Theodore Holder, to A. L. Lockhart, Cummins Diagnostic Center, 8000 West Seventh Street, Pine Bluff, Arkansas 71603, to the Honorable Henry Woods, U.S. District Judge, U.S. Post Office and Courthouse Building, Little Rock, Arkansas 72201, to the Honorable Bill Clinton, Governor, State Capitol, Little Rock, Arkansas 72201, by placing same properly addressed in the United States Mail with sufficient postage to insure delivery this 4th day of February, 1983.

/s/ Bill W. Bristow
One of the Attorneys for Appellant

EXHIBIT 1 TO MOTION FOR PROTECTIVE ORDERS

The following is a copy of a letter dated January 24, 1983, received January 27, 1983, by Oscar Fendler, P.O. Box 548, Blytheville, Arkansas from James Dean Walker, ADC 57392, an inmate at Cummins Diagnostic Center, 8000 W. 7th Street, Pine Bluff, Arkansas 71603:

"Dear Mr. Fendler:

I have received a copy of your proposed letter to the Judges of the Eighth Circuit Court mailed on January 17, 1983, received by me on January 20, 1983. I thank you for sending it to me and for keeping me abreast of your thoughts and efforts in my behalf.

My main reason for writing at this time is to share some information with you that I feel you should have —that Mr. Bristow should have — and that the Court should be aware of.

At the time the Eighth Circuit Court issued its three Judge ruling by Bright, Ross and Heaney — May 4, 1982 — May 19, 1982 — they directed the Arkansas Penal Officials to remove me from 'punitive isolation' and return me to 'administrative segregation'. I do not believe that the Court's intent was to urge Mr. A. L. Lockhart, Mr. Ronald Dobbs, and Mr. Evan Harris to increase the harshment of my confinement — nor do I

believe that the Court intended for me to be discriminated against or be denied fair and equal treatment. However, in the seven months since the Court's ruling, that is precisely what has happened.

Before the Court's ruling on May 4, 1982 — May 19, 1982, I was allowed to have occasional telephone communications with my attorneys. Since the ruling, all telephone call requests by me have been summarily denied.

Before the Court's ruling, I was allowed to be interviewed by members of the news media concerning conditions of my confinement, my safety and well being. Since the Court's ruling all members of the media have systematically been denied access to me — hardly in line with Judge Henry Wood's opinion that the 'white light of publicity would serve to keep me alive'.

Before the Court's ruling, I, like all other inmates, was allowed to have 'extra' visitation time with 'out of state' visitors — those traveling in excess of 300 miles in order to visit. Since the Court's ruling, I have on two separate occasions — most recently, this past Thursday, January 20, 1983 — been denied any additional time with my visitor (Leeta Harris) although she's traveled nearly 4,000 mile round trip to be here. Her request for additional time, as well as my requests, have been summarily denied by Mr. Dobbs and by Mr. Harris.

Before the Court's ruling, I was allowed to have local visitors for one-four (4) hour period each week. Since the Court's order, I am allowed visits only twice a month — four hours each session. This is due to a 'class' reduction I suffered at the time I refused to place myself in possible danger — a fear that the Court ruled 'was not without evidentiary support'. My 'class' status has never been restored to me, in spite of the Court's ruling.

Before the Court's ruling, I was allowed to have 'normal' commissary privileges — i.e., I was allowed to shop at the pen store for those items I may have need of; the same procedure as all other inmates are allowed. Since the Court's ruling, Mr. Dobbs has ordered that I not be allowed this 'normal' procedure. I must now send a list to the store. I am not allowed to personally select items I need — and I have no chance to order substitute items, should the commissary be out of those items on my list. I am the only prisoner in the system that is forced to use this method. Mr. Dobbs also ordered the commissary officer not to allow me to order such items as popcorn, although all other inmates are allowed to do so. Mr. Dobbs also ordered the mail officer not to allow me to receive a 1983 Hallmark calendar that was sent to me at Christmas time. I feel that the discrimination of these actions is transparent.

During the 20 1/2 months I have been confined to this 9' x 7' cell — I have been allowed only one (1) hour of exercise, three (3) times per week, after which I am

allowed a shower period. All other hours of each week are spent in solitary confinement. I have no social interaction during these periods — have no visual contact with others — no vocal communication with others — total isolation.

During these past 20 1/2 months, no doctor has made rounds to check on my physical or mental well-being — no chaplain has been in my area to inquire about possible 'spiritual' needs — no social workers or psychologist has offered any type of assistance to me.

I have asked Mr. Dobbs and Mr. Harris to allow me to attend religious services, to attend movies — privileges that are 'normal' to all other inmates. They have denied these privileges to me. I have asked to be allowed certain hours to view T.V. This privilege has also been denied to me.

I feel that all of the above stated conditions and treatment clearly constitute discriminatory practices on the part of the prison officials — A. L. Lockhart et al — and is clearly retaliation to the Court's Order designed as harassment and to make conditions and treatment to me far more harsh than the Court ever intended.

I, also, believe said conditions and treatment constitute 'cruel and unusual punishment', as prohibited by law. I further believe that the stated conditions and treatment clearly indicate that the prison officials have

no respect for the Court's Orders, no respect for my rights, my well-being, or my life, and are an indication of what abuses may be in store for me should the Court lift its mantle of protection.

I feel that the Court needs to be fully apprised of these matters, as I believe that the officials here are in total contempt of the Court's intent and Order, and should be cited for such contempt. I feel that we should receive damages in the amount of $25.00 per unit of abuse, per day for violation of my civil rights.

I, also, feel we should beg the Court to order me transferred out of A. L. Lockhart's jurisdiction — to order my safety insured. The Court should not — and we should not — allow 'cruel and unusual' punishment today under the theory that it will be corrected at some later date.

As my attorneys, I am asking you and Mr. Bill Bristow to help me remedy the abuses I have suffered and to help prevent any further abuses. And I believe the Eighth Circuit Court to be the proper forum for seeking said relief.

Please advise me of your intention and filings. I need your help.

All best wishes to all of you there."

Respectfully,

s/ James Dean Walker

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES DEAN WALKER — APPELLANT

vs. No. 81-1700

A.L. LOCKHART, Director
ARKANSAS DEPARTMENT
OF CORRECTION — APPELLEE

RESPONSE TO PETITION FOR INJUNCTION

Comes now the defendant, by and through counsel, Steve Clark, Attorney General, and Theodore Holder, Assistant Attorney General, and for his response to the petition served on the defendant on February 7, 1983, states:

I.

The motion served on the defendant on February 7, 1983, is in the nature of an application for stay pending appeal, injunction or other immediate relief, as permitted by Rule 8 of the Federal Rules of Appellate Procedure and Rule 3 of the Rules of the Eighth Circuit, and asks this Court for an injunction. Because this motion does not comply with the requirements of either rule, it should not be granted.

II.

Fed. R. App. P. 8 (a), requires such an application to be first made to the district court or a showing that an application to the district court would be impracticable or that the district court has already denied such a motion. If the district court is alleged to have already denied such a motion, that court's reasons for the denial must be shown. Such has not been done in this motion.

III.

Both Fed. R. App. P. 8 and 8th Cir. Rule 3 require such an application to be accompanied by the judgment, decision, order or decree of the district court denying such a motion. No such orders are attached to the motion now under review.

IV.

Fed. R. App. P. 8 requires a movant to attach to his motion an affidavit or other sworn statement if the facts relied upon for the motion are in dispute, yet no affidavit or other sworn statement is attached, only an unsworn transcription of a purported handwritten letter from the plaintiff to his attorney.

V.

The defendant is aware that in the plaintiff's first

motion for an injunction the Court did not require the plaintiff to comply with the rules and supply the deficiencies set out in paragraphs II, III and IV, and that it will therefore probably not require them in this case. The defendant raises these issues, nevertheless, so as not to waive them.

VI.

In the event the Court considers this motion on its merits, the defendant offers the following response to each of the allegations made therein. Because the letter attached to the motion as Exhibit 1 is much more detailed than the motion itself and in fact reads like a motion or complaint, complete with conclusions of law and an *ad damnum* clause at the end, each of its allegations will, also, be addressed.

The defendant responds generally, however, that the plaintiff has been housed in accordance with the Court's order of May 4, 1982, to-wit: under the conditions as they existed on June 15, 1981.

A. The defendant admits the accuracy of the chronology of the plaintiff's latest stay with the Arkansas Department of Correction set out in paragraph 3, and particularly the assertion in subparts (c) and (e) of that paragraph that the plaintiff has remained by choice in the same or same type of isolation cell since he returned to Arkansas regardless of whether he was in administrative segregation or punitive isola-

tion. The defendant denies, however, that the only difference between the two classifications is one of nomenclature. As is stated in the affidavit of Warden Ronald Dobbs, attached hereto and labeled defendant's Exhibit A, there is a further difference in privileges and conditions.

B. The defendant objects to the request in the *ad damnum* clause of the motion that the Court order the plaintiff removed to a prison facility outside the state of Arkansas not under the defendant's control. That order would not be a preservation of the status quo as is contemplated by Rule 8; rather, such an order would be a decision on the merits of this appeal. Because it is apparent that Rule 8 is not designed to gain a decision on the merits of an appeal by motions, that request should not be granted.

C. *Telephone Calls.* The first allegation in the attachment is that, before the Court's order of May 4, 1982, the plaintiff was allowed "to have occasional telephone communications" with his attorneys, but that since the ruling, all telephone call requests have been summarily denied.

The obvious import of this allegation is that the prison officials have denied these requests in retaliation for having sought and received the May 4 order.

As reflected by Warden Dobbs' affidavit, this allegation is based on incorrect information. It is De-

partment of Correction (Department) policy to allow inmates no telephone calls under normal circumstances. The plaintiff was allowed six telephone calls — not all of which were to his attorneys — between June 19, 1981 and October 13, 1981, by order of the district court to allow him to prepare various legal actions. Since October 13, 1981, some seven months before the May 4, 1982 order, the appellant has received no telephone calls.

(Counsel for the defendant has reviewed the record of the hearings in the district court but has found no such order from Judge Woods.)

Consequently, it cannot be said in this regard that the appellant has been denied anything to which he was entitled on June 15, 1981, or that to which he was not entitled was taken from him in retaliation for the May 4 order.

D. *News Media Contact.* The plaintiff complains that he has been denied access to the press since the May 4 order. Before that order the plaintiff states that he was allowed to have interviews with reporters.

As reflected by Warden Dobbs' affidavit, Department policy is not to allow the news media physical access to inmates. The plaintiff was allowed one press conference, however, when he was first returned to Arkansas, as a way to quickly and expeditiously handle the deluge of media questions asked of Department

personnel about the plaintiff. Also, as was stated in Warden Dobbs' affidavit, plaintiff is allowed to write the media and receive communications from members of the news media.

This is but another example of the plaintiff's having been granted that to which he was not entitled and later claiming it as a right.

E. *Visitation Time.* The plaintiff claims that Department policy is to allow extra visiting time to persons who travel over 300 miles to see an inmate and that the extra time has not been granted on two occasions, one of which occurred on January 20, 1983 in regard to a visitor, Ms. Leeta Harris, whose round trip mileage to visit the plaintiff was over 4,000 miles.

As reflected by Warden Dobbs' affidavit, it is not and has not been Department policy since the plaintiff's latest sojourn into Arkansas to allow such visitors additional visiting time; rather, such visitors are given special consideration as to the date and hour of their visits. All visits are limited to four hours.

As yet another example of the good will shown the plaintiff, the defendant notes that Ms. Harris was once permitted an extra visit to which he was not entitled. As stated in Warden Dobbs' affidavit, this, too, was something afforded the plaintiff to which he was not entitled.

F. *Visitation Frequency/Class Reduction.* The plaintiff next alleges that he was formerly allowed one four hour visit per week and that now he is permitted only two four-hour visits per month. He alleges that this change is due to a reduction in class ordered as a result of the disciplinary proceeding instituted against him for refusing a work assignment and in regard to which the May 4 order was issued.

As reflected by both Warden Dobbs' affidavit and the administrative regulation concerning segregation of inmates, attached hereto as Exhibit B, that the plaintiff was ever allowed one visit per week was a mistake. While the Diagnostic Unit was being built, most, if not all, of the inmates comprising the work crews were Class I inmates who receive one visit per week as per Department regulations. After the unit was completed and lower classes of prisoners were housed there, however, all inmates were still allowed one visit per week.

Shortly after the plaintiff entered the population, the unit policy was changed to comply with department policy effective December 11, 1981, some five months before the May 4 order, and the cut back to two visits per month was instituted for Class II, III and IV inmates then.

This action was not taken in retaliation for the May 4 order and not taken against the plaintiff alone. The action affected all Class II, III and IV inmates at

the unit and was instituted only to change Unit policy.

As noted in Warden Dobbs' affidavit, the plaintiff was a Class III inmate as of June 15, 1981, and remains such at this time. He is therefore entitled to no more than two visits per month under Department regulations.

G. *Commissary Privileges.* The plaintiff complains that, before the May 4 order, he was allowed to shop at the commissary store, but that now he must submit a list of articles he desires to purchase and that, if the store is out of some of the items on the list, he is not permitted to personally substitute other items. He complains that Warden Dobbs has ordered that he not be permitted to order popcorn from the commissary.

As Warden Dobbs' affidavit and the administrative regulation attached hereto show, inmates in segregation avail themselves of commissary privileges by submitting a list of items which may then be delivered to the inmate. Consequently, if the plaintiff has ever been allowed to physically go to the commissary store, it is but another instance of the plaintiff receiving that to which he was not entitled and now claiming the boon as a right.

The allegation as to popcorn is categorically denied. Popcorn is sold by the Department Chapter of the Jaycees at movies and general population visitation and no inmate in administrative segregation — not

just the plaintiff — is permitted to purchase this popcorn. Persons in administrative segregation do not have visits with the general population and are not permitted to go to movies.

H. *1983 Hallmark Calendar.* The defendant denies that Warden Dobbs maliciously ordered withheld from the plaintiff a 1983 Hallmark calendar sent to him as a Christmas present. As the Warden's affidavit and the mailing list attached hereto as Exhibit C later show, the calendar was not receivable because it was not on the approved mailing list.

I. *Remaining Allegations.* As for the remaining allegations in the letter attributed to the plaintiff, the defendant can only respond by stating that he describes the conditions of every inmate in administrative segregation, in which the plaintiff has insisted on remaining.

The defendant is aware that the attached administrative regulation implies that persons in administrative segregation have television privileges. That is not the case at the Diagnostic Unit, however. At that unit *no* person in administrative segregation, and not just the plaintiff, have television privileges because the facility is not equipped to handle it.

The plaintiff can be visited by doctors, chaplains, social workers and psychologists upon request, but he has never requested that any visit him.

His attorneys can visit him at any time upon twenty-four hours' notice. The plaintiff has cited no occasion on which such a visit has been denied, and the defendant knows of none.

WHEREFORE, the defendant prays this Court to issue its order dismissing this motion and denying the relief sought.

Respectfully submitted,

STEVE CLARK
Attorney General

By: /s/ Theodore Holder
THEODORE HOLDER
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Theodore Holder, Assistant Attorney General, do hereby certify that a copy of the above and foregoing pleading has been served on appellant by placing a copy of same in the United States Mail, postage prepaid, addressed to

Hon. Bill W. Bristow
216 East Washington Street
Jonesboro, Arkansas 72401

Hon. Oscar Fendler
P. O. Box 548
Blytheville, Arkansas 72315

attorneys of record for appellant, this 14th day of February, 1983.

/s/ Theodore Holder
THEODORE HOLDER

EXHIBIT A
AFFIDAVIT

I, Ronald Dobbs, am presently at the Arkansas Department of Correction, Diagnostic Unit, in the capacity of Warden.

Telephone calls are not permitted for inmates to call their attorneys under normal circumstances. Calls may be approved in emergency situations. Calls that were approved for Inmate Walker between 6/19/81 and 10/13/81 were done so at the direction of the court in order for Inmate Walker to prepare for various legal actions. Inmate Walker's last approved phone call was on October 13, 1981. Inmate Walker's calls were not stopped as a result of the court order or in retaliation of the court order. All inmate requests for telephone calls are considered on an individual case by case basis.

Inmates at the Arkansas Department of Correction are not afforded press conferences. Inmate Walker's initial contact with the media was allowed due to the notoriety of Inmate Walker and as a courtesy to the Arkansas media. No more media interviews have been permitted but the Department of Correction does have a policy of open correspondence and Inmate Walker may write to or receive letters from the media as often as he likes.

For persons visiting that must travel more than 300 miles in order to visit, the visitor is responsible for

making the request for a date and time to visit. The visitation time is limited to 4 hours for everyone. This has not changed as a result of the court order. Inmate Walker was allowed an extra visit on one occasion when his visitor had been involved in a serious accident. His visitor was allowed another 4 hour visit on another day. At the Diagnostic Unit all inmates were allowed to visit every week up until December 1, 1981, when the unit policy was changed to comply with departmental policy. This change provides for Class I inmates to visit every week and Class II, III, & IV inmates to visit once every two weeks. This change effected every inmate at the Diagnostic Unit.

Inmate Walker was returned to the Department of Correction, Diagnostic Unit on 5/9/81 and was a Class I inmate. On 5/14/81, Inmate Walker was found guilty of a disciplinary for escape and was reduced to Class III and sentenced to 30 days in punitive. While in punitive Inmate Walker was a Class IV inmate but on 6/12/81 after his release from punitive status, Inmate Walker reverted back to his Class III status as required under the provisions of statutory good time. Inmate Walker was a Class III inmate before the court order of May 4, 1982 and has been a Class III inmate ever since.

Inmate Walker is not the only prisoner in the system that must send a list of items to be purchased to the commissary. Inmates in the general population also must fill out a list to take to the commissary. While general population inmates are allowed to go to the

commissary to get their list filled, all inmates assigned to protective custody, administrative segregation, and to the hospital must send lists to the commissary. Inmate Walker is on protective custody status. Popcorn is not a commissary item. Popcorn is sold by the unit "Jaycees" at visitation for the general population and at movies. Again, protective custody inmates, administrative segregation inmates, and inmates in the hospital do not participate in general population visitation or movies.

Inmate Walker was not allowed to have the 1983 Hallmark calendar as it is not on the approved list of items that can be received by an inmate through the mail. A copy of this list is attached.

Inmate Walker is provided with three 1-hour exercise periods plus three showers every week. This is in keeping with departmental policy and applies to all inmates on protective custody status, administrative segregation status, and inmates on punitive status after 15 days on punitive.

Doctors, chaplains, social workers, and psychologists will visit Inmate Walker on request. Inmate Walker has made no such requests that I am aware of. Inmate Walker is in a protective custody cell at his own request. Inmate Walker can verbally communicate with other inmates housed on the wing. Inmate Walker does not have access to movies, television, or group religious services. These items are provided to the general

population of permanently assigned inmates and are not provided to those inmates on protective custody, administrative segregation, punitive, new commitments, or hospital patients.

Inmate Walker was aware of the conditions he would be housed in before he requested the court action pertaining to the same. He has been asked if he desired to change his living conditions by moving to the general population and he has indicated that he did not wish to move. It is my understanding that the court was advised that the Diagnostic Unit was not set up for long term protective custody cases and that the Cummins Unit was where this is normally done but the Department of Correction was directed to keep Inmate Walker at the Diagnostic Unit.

/s/ Ronald Dobbs
RONALD DOBBS

I state on my oath that the above and foregoing facts are true and correct to the best of my knowledge, information, and belief.

/s/ Ronald Dobbs
RONALD DOBBS

Subscribed and sworn to before me on this 14th day of February, 1983.

/s/ Dottie McDaniel
NOTARY PUBLIC

EXHIBIT B

ADMINISTRATIVE REGULATIONS
STATE OF ARKANSAS
DEPARTMENT OF CORRECTION

Section Number 836

Board of Correction Approval Date: 11/29/79 — revised 12/30/81

Attorney General Review Date: 11/29/79

Date Filed Secy. of State: 2/1/80

SUBJECT: Segregation

Segregation is a classification category for inmates in institutions. Inmates may be placed in a segregation classification by the Institutional Classification Committee by a majority vote of the Committee after a hearing at which the inmates must be given an opportunity to appear before and address said Committee and if the inmates:

1. Indicate a chronic inability to adjust in the general prison population.
2. Constitute a serious threat to the security of the institution.
3. Require maximum protection from themselves or if others require maximum protection from them.

A. Routine Procedures for Assignment to Segregation.

1. The inmate shall be given a hearing before the Classification Committee;

2. The inmate shall receive written notice 24 hours prior to the hearing;

3. The inmate shall be allowed to appear before the Committee; to make any statement desired; and to present documentary evidence; including witness statements;

4. The determination as to whether an inmate shall be housed in the maximum security area shall be made by a majority vote of the Classification Committee;

5. The inmate shall be advised of the reasons for his assignment to administrative segregation in the event that such assignment is made. The reasons for such assignment shall be reduced to writing and maintained in the inmate's institutional file;

6. Any inmate who exhibits chronic recalcitrant behavior shall be evaluated by the mental health staff upon request by the classification committee. The results of such evaluation shall be considered by the classification committee in determining whether the inmate's housing assignment shall remain in or be changed to the maximum security area.

B. Emergency Procedures.

In an emergency situation, the highest ranking security officer on duty (shift supervisor) may transfer an

inmate to segregation. Any inmate so transferred shall, within 72 hours, have his status reviewed by the Assistant Warden, Chief Security Officer and a third person designated by the Warden or Assistant Warden. Such reviewing body shall, after interviewing the inmate, either release the inmate from the maximum security area or refer him to the next regularly scheduled meeting of the classification committee for a hearing to be conducted in accordance with the above procedures.

The Committee shall also review the inmate's master folder, and all decisions must be reduced to writing along with the basis for the decision. All such decisions may be subject to review and approval or disapproval by the Chief Administrative Officer or his designee.

Inmates assigned to a segregation classification are subject to the following controls and privileges:

1. Housing in a separate area of the institution determined by the Chief Administrative Officer;
2. Work duties they are physically able to perform;
3. Three meals a day — may be served in cells;
4. Television and/or radio privileges may be denied following minor disciplinary procedures;
5. Institutional activities as approved by the Warden;
6. Regular mail privileges;
7. Chaplains will visit the segregation area

regularly or upon request;

8. Visits may be in a separate visiting room and will be conducted in the presence of an officer;

9. Showers are to be provided at least twice each week and normal toilet articles are to be provided;

10. Referrals to the physician or dentist upon request or for medical emergencies;

11. The opportunity to exercise for at least three (3) hours weekly, either indoors or outdoors when the security of the institution is not jeopardized;

12. Permitted commissary orders — which will be delivered to the segregation unit;

13. Appropriate clothing is to be issued;

14. A reasonable amount of reading material and educational materials approved by Educational Department;

15. Bedding is to be changed weekly and weekly laundry services are to be provided;

16. Access to law material on request.

Inmates leaving or entering the segregation unit must be thoroughly searched and they shall be escorted to and from their destination.

The Classification Committee must review the status of every inmate assigned to the segregation classification at least every 60 days. The Assistant Warden must be a member of the Classification Committee. The Warden will review inmate status annually. An inmate may also request a classification hearing after he has been in the segregation classification for 30 days. If he is not

reclassified at that hearing, he may request a new hearing if his request includes new information not previously available to the Committee.

No inmate may remain in a segregation classification for more than one year unless he has been personally interviewed by the Warden at the end of one year and such action is approved by him. At the end of the second and each additional year that an inmate remains in a segregation classification, he must be personally interviewed by both the Chief Administrative Officer and the Assistant Director, who will then determine whether or not continuation in that status is necessary and/or appropriate.

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EXHIBIT C

ARKANSAS DEPARTMENT OF CORRECTION
DIAGNOSTIC UNIT

MEMORANDUM

TO: ALL CONCERNED

FROM: WARDEN DOBBS

RE: ITEMS AUTHORIZED TO BE RECEIVED IN THE MAIL

DATE: OCTOBER 5, 1982

Following are items that will be authorized to be received in the mail by inmates at the Diagnostic Unit.

(A) MONEY . . . Money sent to inmates must be in the form of a U.S. Postal Money Order. It should be made payable to the inmate and should include his ADC number. For example:

John Doe ADC #00000

Cash, checks, commercial money orders or any other medium of exchange will be returned to the sender.

(B) Only those items listed below may be received through the mail by inmates at the Diagnostic Unit.

Items not listed below will be considered contraband, and will be confiscated. Confiscated items will be returned to sender at the inmate's expense, or they will be destroyed by the inmate.

1. Gloves
2. Socks (white only)
3. Under-shirts (white only)
4. Under-shorts (white only)
5. Tee-shirts (white only)
6. Sweatshirts (white only)
7. Bath towels and washcloths (white only)
8. Pajamas (white only)
9. Belts (1 inch maximum width — black only — with standard buckle)
10. Shoes (no tennis shoes) (standard 1 inch maximum rubber walking heel only)
11. Shower shoes
12. House shoes

NOTE: Specialized work equipment may be approved by the Warden.

Office - Supreme Court, U.S.
FILED
JAN 26 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION
Petitioner,

v.

JAMES DEAN WALKER
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BILL W. BRISTOW, P.A.
Counsel of Record
216 East Washington
Jonesboro, Arkansas 72401
(501) 935-9000

OSCAR FENDLER
P.O. Box 548
Blytheville, AR 72315
(501) 763-6891
Attorneys for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

1. Were the findings of fact made by the District Court clearly erroneous, as that term is understood in Fed. R. Civ. P. 52(a)?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit appears as Walker v. Lockhart, 713 F.2d 1378 (8th Cir. 1983).

JURISDICTIONAL STATEMENT

The Opinion of the United States Court of Appeals for the Eighth Circuit was delivered on August 11, 1983. The Petition for Rehearing En Banc was denied on September 29, 1983. An Amended Order denying rehearing was issued on October 4, 1983.

The Petitioner asserts that jurisdiction is conferred by Title 28, United States Code, Section 1254(1).

LEGAL PROVISION INVOLVED

Rule 52(a) Federal Rules of Civil Procedure

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, the due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a matter, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

James Dean Walker was convicted of murder growing out of the 1963 death of a North Little Rock police officer. He served some twelve years in the Arkansas Department of Correction, but in 1975 was granted a furlough from the Cummins Unit of the Arkansas Prison System and failed to return from same. Four years later, he was apprehended in California, and he fought extradition to Arkansas. Walker attempted to block extradition in both the Federal and California Courts on the basis that his life would be in grave danger if he returned to Arkansas. These legal efforts were denied by this Supreme Court in

Pacileo v. *Walker*, 446 U.S. 1307 (1980) and *Pacileo* v. *Walker*, 449 U.S. 86 (1980) (per curiam).

Upon Walker's return to Arkansas, be brought suit against A. L. Lockhart, the Superintendent of the Arkansas Department of Corrections under 42 U.S.C. Section 1983 contending that his confinement within the Arkansas Penal System violated the Eighth Amendment prohibition against cruel and unusual punishment. He alleged that as a result of threats made against his life by Lockhart that his life would be in danger if he returned to the general prison population in Arkansas. He asked that he be allowed to serve the remainder of his sentence outside the Arkansas Prison System, in either a federal penitentiary or a prison in another state.

The District Court dismissed Walker's Section 1983 claim. The District Court made no findings of fact relating to Lockhart's alleged threats against Walker, but stated that "white light of publicity" about Walker's case would ensure Walker's safety. The District Court specifically left the matter of Walker's safety to the discretion of the Arkansas prison officials.

Walker then appealed the decision to the United States Court of Appeals for the Eighth Circuit which reversed the District Court denial of Walker's Section 1983 claim. A careful reading of the Court of Appeals opinion indicates that the Court relied on the undisputed evidence from both parties that Walker's continued confinement in the Arkansas Prison System would subject him to an unusually high risk of physical danger. Based on this undisputed evidence, the Court of Appeals found that Walker's Section 1983 Petition should be granted.

ARGUMENT

I.

The Court Of Appeals Properly Applied Legal Principles Regarding Cruel And Unusual Punishment To An Undisputed Factual Situation.

James Dean Walker contended on appeal to the Eighth Circuit Court of Appeals that the District Court had erred in failing to order protective measures to assure Appellant's safety. The thrust of the Department of Correction's Certiorari Petition is to argue that the opinion of the Eighth Circuit somehow violated Federal Rule of Civil Procedure 52(a) providing that "findings of fact will not be set aside unless clearly erroneous." However, as the Court of Appeals opinion points out, the undisputed evidence demonstrated that Walker's continued confinement in the Arkansas Prison System would subject him to an unusually high risk of physical danger. This is clearly the case and is in no way at variance with the findings of the District Court who recognized such danger as well. Furthermore, the application of the legal principles to the effect that Walker's continued confinement under such circumstances would amount to cruel and unusual punishment is not challenged by the State in its Petition for Certiorari.

James Dean Walker testified that he had been threatened by A. L. Lockhart, then Warden at the Tucker Unit of the Arkansas Prison System. He recounted this incident in specific terms as to how Lockhart had threatened his life at T.45-50. These threats were corroborated by the testimony of other inmates in the Arkansas Prison System as to hearing threats made by Lockhart against Walker. Finally, Cecil Boren, presently employed at a Federal Correction Institution and formerly the Assistant Superintendent at Cummins testified

under subpoena that he had specifically heard Lockhart threaten inmates, including James Dean Walker. (R.87)

At the first hearing, Lockhart did not see fit to take the stand and deny making the aforesaid threats. At a subsequent hearing, he did deny the existence of such threats. However, of strong importance is the fact that the District Court at no time in any proceeding made any finding either way regarding the existence of these threats. At no time whatsoever did the District Judge say that he found Walker's evidence on the threats not to be credible or that he credited Lockhart's testimony that such threats were not made. Rather, the District Court pointedly refused to make any findings at all regarding the existence of such threats.

However, even the State's evidence indicated that Walker was in danger in the Arkansas Prison System. For example, Dr. Robert Powitzky, Assistant Director in charge of health and correctional programs in the Arkansas penal system, testified at T.130 as follows:

Q. Do you not think that being in an institution under Mr. Lockhart's control, that there are other inmates who have access to Mr. Walker, that this also creates some danger?

A. Yes, sir.

Q. Now, why is that?

A. What I said, for whatever misguided reason, whether they wrongly understood that they might benefit from that, or whether they were going to have some sort of vendetta against Mr. Lockhart.

Q. When you say "vendetta," if they could harm James Dean Walker and get Mr. Lockhart in trouble, so inmates might be happy with that?

A. Yes, sir.

Further, Ronald Dobbs, Assistant Warden in charge of the facility housing Walker admitted at R.117 that he did not know that Walker could be protected. In his words:

> Q. What you're telling me is that if James Dean Walker is put back where other prisoners have access to him, you don't know how he can be protected at this time, do you?
>
> A. At this time, no.

Finally, it is submitted that the comment of the Court at the conclusion of the first hearing at T.140 is of great importance. The Court commented as follows:

> I am not satisfied on the basis of the testimony that I have heard that the man's safety can be assured except in that diagnostic facility down there.

However, at the conclusion of all the proof, the District Court did not order any sort of protective measures to assure the safety of James Dean Walker. He merely announced that he would rely on the "white light of publicity" to keep Walker safe. The District Court ordered no measures whatsoever to prevent Walker from being placed in the general prison population or to be given any sort of protection whatsoever.

As a matter of law, it is contended by James Dean Walker that having to endure fear in an incarcerated condition as a result of the threats on his life by his jailor is a form of cruel and unusual punishment violative of the Eighth Amendment. See *Hudspeth* v. *Figgins*, 584 F.2d 135 (4th Cir. 1978). The record clearly demonstrated that even the state officials recognized that Walker was in danger from other prisoners, who might be trying to curry favor with Lockhart by causing harm to James Dean Walker, or might be trying to cause Lockhart embarrassment by causing harm to James Dean Walker.

Under either event, James Dean Walker would be hurt or killed. Furthermore, the evidence was undisputed that the aforesaid danger was ready and apparent from the standpoint of the other inmates and James Dean Walker was living in solitary confinement because of such perceived dangers.

Under these circumstances, the District Court made no findings about whether the threats were made. Furthermore, the District Court made no explanation as to why the District Court would ignore the undisputed evidence that Walker's life was in danger in the Arkansas Prison System. Certainly, the application of law by the Court of Appeals is correct.

The Court of Appeals indicated that the administration of prisons was generally not within the province of the Court. However, the Court of Appeals stated that the undisputed evidence demonstrated that Walker's continued confinement in the Arkansas Prison System would subject him to an unusually high risk of physical danger. The evidence indicated that Arkansas in the past had transferred inmates to the federal system or to prison systems in another state. The Court of Appeals then held that it did not agree with the District Court that the "white light of publicity" would insure Walker's safety. The Court squarely held that there was no evidence in the record to show that Walker's notoriety would keep him safe and that there was ample evidence to the contrary.

Under the aforesaid circumstances, the actions and findings by the Eighth Circuit Court of Appeals do not violate any provision in Rule 52(a) of the Federal Rules of Civil Procedure. This case has involved the Court of Appeals properly applying law to an undisputed factual situation. There is no basis for the granting of certiorari in this matter pointed out in Petitioner's Brief.

CONCLUSION

Respondent respectfully submits that the United States Court of Appeals for the Eighth Circuit has properly applied law to an undisputed factual situation and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: BILL W. BRISTOW, P.A.
Counsel of Record
216 East Washington
Jonesboro, Arkansas 72401
(501) 935-9000

OSCAR FENDLER
P.O. Box 548
Blytheville, AR 72315
(501) 763-6891
Attorneys for Respondent